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# "GET OFF MY PLANE": THE NEED FOR EXTREME DEFERENCE TO CAPTAINS AND CREWS ON INTERNATIONAL FLIGHTS UNDER THE TOKYO CONVENTION OF 1963

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## I. INTRODUCTION

AT THE CLIMAX of Columbia Pictures' thriller "Air Force One,"[1] Harrison Ford, playing the role of the exceptionally fight-savvy Medal of Honor-winner and President of the United States of America, outwrestled a terrorist who had infiltrated and taken control of the President's plane, one of the most secure methods of transfer in the world. With the cargo door of the plane ajar, Ford cleverly opened his opponent's parachute, held him by the strap, coldly stared into his opponent's bewildered face as he exclaimed, in the type of grizzly voice that could only fit a war-hardened soldier, one of his most memorable quotes on screen: "Get off my plane!" The terrorist's eyes went wide, and he was sent flying off the plane, presumably never to be heard from again.

Those four words, "Get off my plane," could and should be used more often, not just by dramatically portrayed presidents in films but by flight captains and crews operating international airplanes—without fear of liability when they use these words with (potentially) dangerous or disruptive passengers.

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[1] AIR FORCE ONE (Columbia Pictures 1997).

It is curious that even ten years after the tragic terrorist attacks of 9/11, the focus of aviation security in the United States still seems to be on measures taken *before* a plane takes off. Most of these measures have been made possible through the Aviation and Transport Security Act (ATSA),[2] which paved the way to a number of laws, procedures, and acts.[3] There have been internal upgrades in airport security beginning with the creation of the Transportation Security Administration (TSA), which infused the country with roughly 65,000 new federal personnel, increased screening procedures, such as criminal background checks for airline employees,[4] and required fortification of the cockpit door.[5] More familiar to the casual passenger, though, are the "numbing array of new security measures"[6] before one even boards a plane: limitations on the number of carry-on bags, hand searches of bags, the ban on water bottles, the removal of shoes and laptops for X-ray screening, random selections for additional pat-downs, and, as of December 2010, the introduction of the Advanced Imaging Technology (AIT) units.[7] However, all the added security at airports and passenger screening cannot guarantee safety once a flight is in the air, since "a passenger once on the plane can be just as dangerous as a bomb."[8] After all, the screening process is not perfect, and inevitably, some banned items will find their way onto planes; nor can screening keep the world's oldest weapon, a clenched fist, off of a plane or keep every passenger from erupting in anger mid-flight. One might argue that the added procedures even *increase* the possibility of the latter happening.

With all of these new security measures, it seems ironic that perhaps the greatest protection afforded to passengers during an international flight is a treaty signed nearly fifty years ago in

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[2] *See* Aviation and Transport Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

[3] Kelcie C. McCrae, *Airport Measures Change 10 Years After 9/11*, A&T REG. (Sept. 11, 2011), http://www.ncatregister.com/theyard/on_the_yard/airport-measures-change-years-after/article_39e2dbf0-dcbc-11e0-adad-0019bb30f31a.html.

[4] Alicia B. Taylor & Sara Steedman, *The Evolution of Airline Security Since 9/11*, INTERNATIONAL FOUNDATION FOR PROTECTION OFFICERS (Dec. 2003), http://ifpo.org/articlebank/evolution_of_airline.html.

[5] Rick Seaney, *After 9/11: Are We Safer in the Air?*, ABC NEWS (Aug. 25, 2011), http://abcnews.go.com/Travel/911-safer-air/story?id=14372486#.TxMnAvm20hA.

[6] *Id.*

[7] *Id.*; McCrae, *supra* note 3.

[8] Taylor & Steedman, *supra* note 4.

Tokyo: The Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention).[9] Currently with 185 parties,[10] the Tokyo Convention gives captains and their flight crews broad powers to act to preserve the safety of the aircraft and its passengers, empowering the captain to take preventative measures.[11] For example, the captain may divert and ground a plane and disembark a passenger or passengers when he has "reasonable grounds" to believe a passenger has committed or is about to commit an "offence[ ] against penal law" or an act which "may or do[es] jeopardize the safety of the aircraft or of persons or property therein or which jeopardize[s] good order and discipline on board."[12] What gives these broad powers bite is that, if the captain has "reasonable grounds to believe" there is a threat, he has immunity from any potential criminal or civil liability.[13] As such, the captain and crew can act quickly and without second-guessing when the safety of the flight is or could be at stake.[14]

The critical question this raises is just what constitutes "reasonable grounds" under the Tokyo Convention. Should courts grant the captain or crew a great deal of deference, applying something akin to an arbitrary or capricious standard by which to judge their actions? Or should courts apply a more stringent negligence standard? This issue was recently the subject of a controversial Ninth Circuit decision in July 2010.[15] In *Eid v. Alaska Airlines, Inc.*, the majority incorrectly applied an American negligence standard of reasonableness.[16] Given that this issue "presents an important question of treaty interpretation affecting the ability of tens of thousands of commercial airline crews across the country to maintain safety and security onboard international flights,"[17] applying the proper level of deference is

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[9] *See* Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Tokyo Convention].

[10] *Convention on Offences and Certain Other Acts Committed on Board Aircraft Signed at Tokyo on 14 September 1963*, INT'L CIVIL AVIATION ORG., http://www2.icao.int/en/leb/List%20of%20Parties/Tokyo_en.pdf (last visited Aug. 29, 2012).

[11] *See* Tokyo Convention, *supra* note 9.

[12] *Id.* arts. 1(1), 5–9.

[13] *Id.* arts. 6–10.

[14] *See id.*

[15] *See* Eid v. Alaska Airlines, Inc., 621 F.3d 858, 866 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2874 (2011).

[16] *See id.*

[17] Linda L. Lane, Kimberly R. Gosling & Don G. Rushing, *Recent Developments in Air Carrier Litigation*, 76 J. AIR L. & COM. 197, 198 (2011).

critical. The purpose of this comment is to show that, contrary to the ruling in *Eid*, courts ought to afford a great deal of deference to captains and their crews. Doing otherwise jeopardizes the safety of the entire aircraft by resulting "in hesitation by the pilot in circumstances where he should have acted, second-guessing by courts, and the discovery of arguments which had escaped the attention of the aircraft commander."[18]

Part II of this comment provides a historical background of the drafting of the Tokyo Convention, beginning with the events that created the need for it and continuing through the drafting process. Part III explains the two cases that have addressed the issue of the level of deference to the captains and their crews under the Tokyo Convention. Part IV analyzes those decisions and argues that the appropriate standard to be applied is one of great deference.

## II. HISTORICAL BACKGROUND OF THE TOKYO CONVENTION

The Tokyo Convention began as a project intended to clarify certain jurisdictional issues arising from criminal acts occurring on board airplanes. However, through years of committees and draft conventions, the primary objective ultimately became flight safety, and with it, clarification of the rights and powers of the commander of the aircraft and, to a lesser extent, the crew. This change took place because of the evolving nature of air travel and the increasing number of incidents arising on board aircrafts.

### A. Climate of and Problems in Air Travel in the 1940s

Although the first draft of the Tokyo Convention was drawn up in 1950,[19] discussions about the need for a convention clarifying certain problems with international air travel had been

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[18] *Eid*, 621 F.3d at 886 (Otero, J., dissenting) (citing Int'l Civil Aviation Org. [ICAO], International Conference on Air Law, Tokyo, Japan, Aug–Sept. 1963, *Minutes*, at 223, ICAO Doc. 8565-LC/152-1 (1966) [hereinafter Minutes to Tokyo Convention]).

[19] Robert P. Boyle & Roy Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 30 J. Air L. & Com. 305, 306–07 (1964). It is important to note, as this source will be cited heavily in the forthcoming sections, that the authors of this article were the chief of the U.S. delegation to the Tokyo International Conference on Air Law and a former staff adviser to a presidential steering committee on U.S. international air transport policy. As such, they offer not only a first-hand account of the drafting process but also, more importantly, an understanding of the drafters and signatories at the original convention as to

evolving since as early as 1902.[20] However, it was only with a general shift in the climate of air travel, coupled with some specific events in the 1940s and onward, that this discussion reached the point of a pressing need. It seems no coincidence that the work on the Tokyo Convention began as the airline industry was entering the "[e]ra of [c]ommercial [j]ets."[21] Between 1935 and 1941, which saw the introduction of a new type of airplane, the number of passengers flying in the United States increased fivefold.[22] This trend only increased as faster and more efficient engines were introduced in the late 1940s and early 1950s.[23] However, with such an increase, two problems emerged: (1) as airlines were able to offer longer journeys, they started offering passengers amenities such as alcohol to offset some of the discomfort of air travel, which increased the likelihood of fights breaking out mid-flight and (2) the added volume of passengers and flights increased opportunities for crimes such as smuggling.[24]

The most pressing issue related to these problems was under whose jurisdiction an offender would fall if he committed a crime during an international flight.[25] This problem is clearly demonstrated by the following hypothetical: "Suppose, for ex-

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what the language "reasonable grounds to believe" was intended to mean. *Id.* at 305.

[20] *See* Allan I. Mendelsohn, *In-Flight Crime: The International and Domestic Picture Under the Tokyo Convention*, 53 VA. L. REV. 509, 513 (1967) (citing *Régime Juridique des Aérostats; Rapport et Projet de M. Paul Fauchille*, 19 ANN. L'INST. DROIT INT'L 19, 51–54 (1902) ("French jurist recommend[ing] that the law of the flag . . . should govern acts committed on board an aircraft")); *see also* Gerald F. Fitzgerald, *The Development of International Rules Concerning Offenses and Certain Other Acts on Board Aircraft*, 1 CAN. Y.B. INT'L L. 230, 231 n.4 (1963).

[21] Asif Siddiqi, *The Era of Commercial Jets*, U.S. CENTENNIAL OF FLIGHT COMMISSION, http://www.centennialofflight.gov/essay/Commercial_Aviation/Jet_Era/Tran7.htm (last visited Aug. 29, 2012) [hereinafter *The Era of Commercial Jets*]; *see also* Asif Siddiqi, *The Opening of the Commercial Jet Era*, U.S. CENTENNIAL OF FLIGHT COMMISSION, http://www.centennialofflight.gov/essay/Commercial_Aviation/Opening_of_Jet_era/Tran6.htm (last visited Aug. 29, 2012) [hereinafter *The Opening of the Commercial Jet Era*]; SAMI SHUBBER, JURISDICTION OVER CRIMES ON BOARD AIRCRAFT 13 (1973) (noting the dramatic change in the development of civil aviation before and after 1950).

[22] Judy Rumerman, *Commercial Flight in the 1930s*, U.S. CENTENNIAL OF FLIGHT COMMISSION, http://www.centennialofflight.gov/essay/Commercial_Aviation/passenger_xperience/Tran2.htm (last visited Aug. 29, 2012).

[23] *See The Opening of the Commercial Jet Era*, *supra* note 21 (noting the British Overseas Aircraft Corporation's introduction of the Comet 1 as the first commercial jet airliner to be introduced into service).

[24] *See* SHUBBER, *supra* note 21, at 13.

[25] *See* Mendelsohn, *supra* note 20, at 509–10.

ample, that an American businessman poisons his British wife while both are aboard an Air India flight direct from Rome to Copenhagen. Exactly where the poison was administered is not known. It could have been over Italy, the Adriatic, Austria, Czechoslovakia, Germany, Denmark or the Baltic Sea."[26] Under those facts and the varying bases of jurisdiction recognized in international law prior to the Tokyo Convention, it is entirely possible that the United Kingdom, Czechoslovakia, Italy, Austria, Germany, Denmark, the United States, or even India could claim jurisdiction under existing principles of jurisdiction in international law.[27] Under the jurisdictional basis of territoriality—that each state may exert sovereign control over all acts occurring within or above its territory—each country over which the plane flew could claim jurisdiction, provided that it could be proven exactly where the poisoning occurred.[28] India could assert jurisdiction under territoriality "by treating an Indian flag aircraft, like a vessel, as a juridical extension of Indian territory."[29] Additionally, on the basis of nationality—that each state is assumed to have legal control over its nationals—the United States could assert jurisdiction.[30] Similarly, under the "passive personality doctrine," which states that jurisdiction can be asserted based upon the nationality of the victim, Britain could assert jurisdiction.[31]

Even more troubling, however, is the possibility that no country could assert jurisdiction, which is conceivable if in fact the poisoning in the above hypothetical had taken place over the Adriatic or Baltic Seas.[32] A complete lack of jurisdiction is indeed what happened in the famous case of *United States v. Cordova*.[33] In *Cordova*, shortly after take-off from San Juan, Puerto Rico, in August of 1948, Cordova, having consumed too much rum prior to take-off, assaulted the pilot, a stewardess, and another passenger while the flight, operated by an American corporate airline, was over the Atlantic Ocean.[34] Upon arrival at La Guardia Field, Cordova and another passenger were immedi-

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[26] *Id.* Note that at the time of the illustration, Czechoslovakia was still one country. *See id.*

[27] *Id.* at 510.

[28] *See id.* at 511.

[29] *Id.* at 512.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 510.

[33] 89 F. Supp. 298 (E.D.N.Y. 1950).

[34] *Id.* at 300.

ately arrested.[35] However, the plane assaults had all taken place over high seas; therefore, Cordova was not convicted, despite the judge finding him guilty of committing the offenses, because there was no federal jurisdiction to punish those acts.[36] Against problems such as this, combined with the new climate in air travel, "the scale and rate of growth of air transport made the need for a convention much greater than [ever] before,"[37] and the international community decided to take the necessary legislative action.

### B. The Drafting of the Convention: From Jurisdiction to Safety

The International Civil Aviation Organization (ICAO) was created by the Chicago Convention to "meet[ ] the needs of the peoples of the world for safe air transport."[38] The subject first arose at the Sixth Session of the Legal Committee of ICAO at Montreal in 1950 when the Mexican Representative of the ICAO Council proposed to the Legal Committee to consider the "legal status of aircraft."[39] Although the Legal Committee did not immediately include the subject into its work program, it did refer this topic to an ad hoc subcommittee, noting that "such a study [was] not purely theoretical and present[ed] many problems of considerable importance."[40] Furthermore, after receiving a communication from the International Federation of Airline Pilots' Associations (IFALPA) arguing that airline pilots should not be held civilly liable in the course of their flying duties, the ad hoc subcommittee determined that both the "Legal Status of the Aircraft" and the "Legal Status of the Aircraft Commander" should be considered.[41] At the Seventh Session of the ICAO Legal Committee, the subcommittee delineated certain jurisdictional needs to be addressed and admonished the organization that "it [was] essential to define clearly . . . the rights and obligations [of the aircraft commander] to be recognized uniformly

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[35] *Id.*

[36] *Id.* at 304. This is not the only such case where this problem arose. *See* Fitzgerald, *supra* note 20, at 230 n.1 (listing several British cases that encountered the same jurisdictional problem).

[37] SHUBBER, *supra* note 21, at 14.

[38] *Id.* at 6.

[39] Boyle & Pulsifer, *supra* note 19, at 307.

[40] *Id.*

[41] *Id.* at 308.

by all [c]ontracting [s]tates as belonging to an aircraft commander with their limitations and *possible extensions*."[42]

Despite the apparent urgency, it was not until 1953 that the ICAO Council placed the "Legal Status of the Aircraft" on the work program of the Legal Committee, finally directing the Legal Committee to begin active work.[43] It created a formal subcommittee, "whose only task [was] to study, consider and advise on the problems [that] may arise in connection with crimes in aircraft,"[44] beginning the systematic study of the topic of "Legal Status of the Aircraft."[45] The subcommittee was not simultaneously tasked with studying the "Legal Status of the Aircraft Commander."[46] This "remained on the work program of the Legal Committee as a dormant item."[47] After several exploratory sessions, the subcommittee limited its scope mainly to the jurisdictional issues discussed in Part II(A) of this comment and elicited the aid of several states in analyzing the issues.[48] The United States undertook a report focusing strictly on issues arising from criminal acts.[49] It focused on the competing bases for the exercise of penal jurisdiction[50] and ultimately decided that only two have unanimous acceptance in every country: the territoriality basis (that each state has complete and absolute sovereignty over its airspace) and the state-of-registry basis (that jurisdiction lies in the state in which the aircraft is registered).[51]

The subcommittee took its first steps toward developing a draft convention in 1956 at Geneva, dealing specifically with the subject matter discussed in the U.S. report and limiting the scope of its study to the criminal aspects of the problems relating to the legal status of aircraft.[52] Thus, any issues concerning civil matters were formally dropped from the "Legal Status of the Aircraft."[53] The aim of the convention became "the recognition, by international agreement, of the competence of [s]tates

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[42] *Id.* at 308–09 (emphasis added).

[43] *Id.* at 311.

[44] SHUBBER, *supra* note 21, at 7.

[45] Boyle & Pulsifer, *supra* note 19, at 311.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 311–12.

[49] *Id.* at 312.

[50] For a discussion of some of these competing bases for jurisdiction, see *supra* notes 28–31 and accompanying text.

[51] Boyle & Pulsifer, *supra* note 19, at 312.

[52] SHUBBER, *supra* note 21, at 7.

[53] Boyle & Pulsifer, *supra* note 19, at 316.

to establish jurisdiction of their courts under national laws."[54] However, "the [s]ub-committee also decided to [formally] consider . . . the 'Legal Status of the Aircraft Commander,' insofar as it related to crimes committed on board aircraft," thus reviving the dormant subject.[55]

The momentum built at Geneva ground to a halt under the party states' inability to agree on the jurisdictional issues.[56] However, under strong urging from the United States, the Legal Committee decided to schedule another meeting of the legal status subcommittee in 1958.[57] To expedite action, the United States prepared a draft convention for use by the subcommittee, which was submitted to the ICAO in August of 1958.[58] It has been suggested that this report was the foundation for further work on the convention, making it "the precursor to the first ICAO draft."[59]

The first draft convention of the "Legal Status of the Aircraft" was produced at Montreal in 1958.[60] Despite significant resistance from some who thought a convention was unnecessary, the subcommittee ultimately moved forward with a draft convention, citing (1) the need to clarify the jurisdictional issues and (2) "the need to define the powers of the aircraft commander to take necessary measures in respect of acts on board endangering the safety of flight and for the preservation of order over the passengers on board."[61] With respect to the powers and duties of the aircraft commander, the subcommittee "was guided by considerations relating to safety of the aircraft," specifically stating that it was important "that there should be internationally adopted rules which would enable aircraft commanders to maintain order on board . . . in respect to offenses or . . . any acts endangering safety of the aircraft or persons or goods on board" and to provide immunity from liability.[62] Thus, from the very

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[54] *Id.* at 317.

[55] *Id.* at 316.

[56] *Id.* at 318.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 319. *But see* SHUBBER, *supra* note 21, at 8.

[60] Boyle & Pulsifer, *supra* note 19, at 320.

[61] *Id.* (quoting Rep. of the ICAO Legal Status of the Aircraft Sub-Comm., Sept. 20, 1958, LC/SC Legal Status No. 63) (internal quotation marks omitted).

[62] *Id.* at 321 (quoting Rep. of the ICAO Legal Status of the Aircraft Sub-Comm., Sept. 20, 1958, LC/SC Legal Status No. 63) (internal quotation marks omitted).

first draft, a dominant theme arose: "that the [c]onvention should have, *as a principal purpose, the enhancement of safety.*"[63]

Continuing the momentum gained in Montreal, the full Legal Committee met the next year in Munich to consider the draft convention.[64] After resolving the lingering jurisdictional issues, the committee focused the scope of the draft:

> Careful attention was given to that part of the draft convention dealing with the powers and duties of the aircraft commander. Having in mind *that the aircraft commander will not normally have legal training*, the [c]ommittee formulated his powers in relation to acts which are "prejudicial to the safety of the aircraft or persons or property therein or to good order and discipline on board." In respect to such acts the aircraft commander may impose necessary measures of restraint on the actor . . . .[65]

Furthermore, it was decided that upon landing, the aircraft commander may disembark and turn over to the authorities an actor if the commander "has reason to believe a 'serious offense' has been committed."[66] Lastly, the committee decided that the aircraft commander should enjoy full immunity from any liability if acting pursuant to the convention.[67] Having completed a draft convention, the committee requested international organizations and ICAO member states to submit comments on the draft.[68]

Over the next three years, the issue of safety aboard aircraft finally became the primary purpose of the convention. While the legal committee awaited the comments from member states, there was "a rash of hijacking incidents" both in the United States and internationally.[69] The dramatic surge in cases of such serious breaches of safety led the United States to propose an addition to the draft convention governing hijacking.[70] The Le-

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[63] *Id.* (emphasis added).

[64] *Id.*

[65] *Id.* at 323 (quoting Rep. of the ICAO Legal Comm., 12th Sess., Aug. 1959) (emphasis added).

[66] *Id.* at 323–24.

[67] *Id.* at 324.

[68] *Id.*

[69] *Id.* at 325; *see* Fitzgerald, *supra* note 20, at 240–41 n.24 (listing in detail hijacking incidents in then-Czechoslovakia, the Far East, Cuba, the United States, Venezuela, Portugal, and Mexico and noting that such incidents forced the United States to draft legislation concerning added security measures on board aircraft); SHUBBER, *supra* note 21, at 344 app. II (listing over a dozen cases of hijacking internationally between 1958 and 1961).

[70] Boyle & Pulsifer, *supra* note 19, at 325.

gal Committee held two sessions in 1962 and adopted the proposed hijacking article;[71] additionally, "[t]he various changes . . . made by the [c]ommittee . . . dealing with the powers and duties of the aircraft commander were substantially incorporated."[72]

Finally, on August 20, 1963, thirteen years after the project's creation, the ICAO Council convened at Tokyo for the "further consideration, finalization, adoption and opening for signature of the Rome Draft."[73] "Sixty-one [s]tates and five international organizations were represented at the [c]onference,"[74] and on September 14, 1969, the parties present signed the convention, ushering in a new era in international air law.[75] With respect to the powers of the aircraft commander, the language of the treaty finally settled upon is found in Chapter III and reads, in relevant part:

> Article 6
>
> 1. The aircraft commander may, when he has *reasonable grounds to believe* that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1,[76] impose upon such person *reasonable measures* including restraint which are necessary:
>
> (a) to protect the safety of the aircraft, or of persons or property therein; or
>
> (b) to maintain good order and discipline on board; or
>
> (c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this [c]hapter.
>
> 2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventative measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft . . . .

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[71] *Id.* at 325, 327–28.

[72] *Id.* at 328.

[73] SHUBBER, *supra* note 21, at 12.

[74] *Id.*

[75] *See id.*

[76] Article 1, paragraph 1 states: "This Convention shall apply in respect of: (a) offences against penal law; (b) acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board." Tokyo Convention, *supra* note 9, art. 1, ¶ 1.

Article 8

1. The aircraft commander may, in so far as it is necessary for the purpose of subparagraph (a) or (b) of paragraph 1 of Article 6, disembark in the territory of any [s]tate in which the aircraft lands any person who he has *reasonable grounds to believe* has committed, or is about to commit, on board the aircraft an act contemplated in Article 1, paragraph 1(b).

2. The aircraft commander shall report to the authorities of the [s]tate in which he disembarks any person pursuant to this Article, the fact of, and the reasons for, such disembarkation.

Article 9

1. The aircraft commander may deliver to the competent authorities of any [c]ontracting [s]tate in the territory of which the aircraft lands any person who he has *reasonable grounds to believe* has committed on board the aircraft an act which, *in his opinion*, is a serious offence according to the penal law of the [s]tate of registration of the aircraft . . . .

3. The aircraft commander shall furnish the authorities to whom any suspected offender is delivered in accordance with the provisions of this Article with evidence and information which, under the law of the [s]tate of registration of the aircraft, are lawfully in his possession.

Article 10

For actions taken in accordance with this [c]onvention, neither the aircraft commander, any other member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.[77]

## III. RECENT INTERPRETATIONS OF "REASONABLE GROUNDS TO BELIEVE" AND "REASONABLY" UNDER THE TOKYO CONVENTION

The finalization of the Tokyo Convention proved anticlimactic: no cases were brought forward. In fact, to date, only two international cases have contested actions taken by the aircraft commander and his crew under the Tokyo Convention—a 2006 magistrate court decision in Israel[78] and the 2010 *Eid* case in the

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[77] *Id.* arts. 6, 8–10 (emphasis added).

[78] DC (Hi) 1716/05 A Zikry v. Air Can. [2006] (Isr.); *see* Moshe Leshem, *Court Analyzes the Elements of Air Carriers Immunity Under the Tokyo Convention 1963:* Zikry v. Air Canada, 32 AIR & SPACE L. 220 (2007).

Ninth Circuit.[79] The timing of these cases suggests that perhaps the Tokyo Convention is enjoying a resurgence of interest related to changes in aviation following the terrorist attacks of 9/11. As such, determining the appropriate level of deference to be given the airplane captain and crew acting pursuant to their powers under the Tokyo Convention is a question that may soon cease to be academic and instead form the center of the controversy.

### A. THE *ZIKRY* DECISION

During an Air Canada flight from Tel Aviv to Toronto on August 25, 2004, flight crew members began to suspect that the plaintiff had smoked in the aircraft lavatories when two passengers sitting adjacent to the lavatories in the middle of the aircraft informed the crew members that one passenger was frequenting the lavatories, and that upon his exit each time, he smelled of cigarette smoke.[80] One of the passengers identified the plaintiff and informed the flight crew that she had also overheard a conversation between two other passengers saying that they believed the plaintiff had neutralized the smoke detectors and was smoking in the lavatory.[81] The crew asked the passengers if they could describe the man in question, and their description matched that of the already-suspected plaintiff.[82] On further investigation, the flight attendant confirmed that the passenger definitely smelled of smoke.[83] Furthermore, "[a] flight attendant recovered a cigarette butt from the lavatory waste-bin" that matched the brand of cigarettes the plaintiff admitted having in his bag.[84]

The flight crew confronted the passenger, taking his passport, and upon landing in Toronto, two policemen questioned the plaintiff but ultimately let him go.[85] However, an Air Canada official, to whom the police had directed the plaintiff upon his release, took his flight tickets and cancelled them.[86] The plaintiff purchased another ticket to his final destination, Montreal,

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[79] Eid v. Alaska Airlines, Inc., 621 F.3d 858 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2874 (2011).

[80] Leshem, *supra* note 78, at 220, 222–23.

[81] *Id.* at 223.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 220.

[86] *Id.*

again on an Air Canada flight, "since [the Air Canada counter] was the only operating counter."[87] But when the plaintiff boarded the flight to Montreal, "Air Canada's personnel ordered [him] to disembark."[88] Approximately one month later, he received a letter "advis[ing] him that he was banned from further flight on Air Canada's flights . . . until he proved to Air Canada's satisfaction" that he did not pose a further risk.[89] The plaintiff filed suit, alleging "that the flight crew members had humiliated him in front of the passengers," despite his continued denial of smoking or attempting to smoke on board the aircraft, and that the measures taken by the crew members were libelous within the meaning of the Israeli Defamation Law of 1965.[90]

In defense, Air Canada invoked Articles 6 and 10 of the Tokyo Convention.[91] Article 6 states that where an aircraft commander "has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft," an act (potentially) jeopardizing the "safety of the aircraft" or the "good order and discipline on board," he may take "reasonable measures . . . to protect the safety of," or "good order and discipline on," the aircraft.[92] Additionally, Article 6 provides that "[t]he aircraft commander may require or authorize the assistance of other crew members" to meet those goals.[93] Article 10 grants aircraft commanders immunity from any action, civil, criminal, or arbitration, "[f]or actions taken in accordance with th[e] [c]onvention."[94]

Addressing this issue of immunity for the first time in any courtroom, the court took an approach that was highly deferential to the captain.[95] The court determined that the pertinent question was not whether an act was committed that did, in fact, jeopardize the safety of the flight, but whether "under the captain's discretion" such an act might have been committed.[96] Furthermore, the court emphasized that it would not judge the actions with the benefit of hindsight, but rather as the captain

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87 *Id.* at 220–21.
88 *Id.* at 221.
89 *Id.*
90 *Id.*
91 *Id.* at 221–22; *see* Tokyo Convention, *supra* note 9, arts. 6, 10.
92 Tokyo Convention, *supra* note 9, art. 6; *see* Leshem, *supra* note 78, at 221.
93 Tokyo Convention, *supra* note 9, art. 6; *see* Leshem, *supra* note 78, at 221.
94 Tokyo Convention, *supra* note 9, art. 10.
95 *See* Leshem, *supra* note 78, at 222–24.
96 *Id.* at 222.

would have understood them in the moment: "one should not examine whether it has been proved that the plaintiff actually smoked during the flight" but rather whether there was "an act . . . committed, which under the captain's discretion constituted offense, even if post factum it was a false apprehension."[97]

Thus, in determining whether the airline should enjoy the immunity provided by the convention and whether the captain had "reasonable grounds to believe that an act had been committed [that] jeopardized the safety of the flight," the court granted a great deal of deference to the captain and crew.[98] The court clearly demonstrated this by emphasizing that the airline did not have to prove that the plaintiff actually had smoked on the flight but rather only that it had reasonable grounds to believe that he may have done so.[99] "Thus, the court [made] the important distinction between what actually happened and what was reasonably believed by the crew members to have happened" and "further stressed that *the facts should not be examined in hindsight*, but at the time of the actual event."[100] Thus, the air carrier did not have to prove that the plaintiff actually did smoke, but only that "*at the time the occurrence took place*, the crew had reasonable grounds to believe that safety was jeopardized."[101]

Applying the above to the facts, the court found that when the possibility of someone smoking arose on the flight, "it was strong enough to justify the steps taken by Air Canada's personnel" and that the crew members' chief consideration was maintaining good order and safety on board.[102] The court further found that the steps taken by the crew were reasonable and therefore not libelous.[103] It also concluded that banning the plaintiff from Air Canada flights until he proved to no longer be a safety risk was reasonable as well.[104]

While the court did not define "reasonable grounds to believe," it clearly granted the aircraft commander and his crew substantial deference. The court examined the facts only as they occurred in the eyes of the aircraft commander and crew at

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97 *Id.*

98 *Id.*

99 *See id.*

100 *Id.* at 222–23 (emphasis added).

101 *Id.* (emphasis added).

102 *Id.* at 223.

103 *Id.*

104 *Id.*

the time and found that the further preventative measures of cancelling the plaintiff's new tickets to Montreal and banning him indefinitely from Air Canada were also reasonable, as they were made in the name of aircraft safety.

### B. THE *EID* DECISION

The Ninth Circuit faced a similar scenario to that of the *Zikry* court but took the opposite approach, applying an objective American negligence standard of reasonableness in interpreting the treaty.[105] The Ninth Circuit was ruling on a summary judgment motion by the district court dismissing the case under the Tokyo Convention;[106] it did not rule on whether the captain acted reasonably but rather on whether there existed a question of fact that should be sent to the jury.[107] This procedural posture is important because it led the court to incorrectly look at the facts as the plaintiffs alleged them, under the premise that in summary judgment the facts must be looked at most favorably to the non-moving party.[108]

On September 29, 2003, a group of Egyptian businessmen and their significant others boarded an Alaska Airlines flight from Vancouver to Las Vegas, where they were to meet with a potential business partner at a convention on energy-related products.[109] The plaintiffs were flying in the first-class cabin, where they occupied all but three of the seats.[110] According to the one other passenger in the first-class cabin, tension appeared to be running high between the Egyptian passengers and the flight crew from the beginning of the flight.[111] About an hour after take-off, one of the plaintiffs sitting in the first row stood up to stretch but was asked by a flight attendant to take a seat or move toward the rear of the first-class cabin to stretch, as standing is not permitted directly outside the cockpit.[112] He moved to the back, but another flight attendant ordered him to sit down, using "an unpleasant loud voice."[113] The plaintiffs al-

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[105] *See* Eid v. Alaska Airlines, Inc., 621 F.3d 858, 867–68 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2874 (2011).

[106] *Id.* at 865.

[107] *Id.* at 875.

[108] *Id.* at 862. That the facts should be viewed as the plaintiffs allege them will be disputed in Part IV of this comment. *See* Part IV, *infra*.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

leged that the same flight attendant "continued to hector him," gave him a "Customer Inflight Disturbance Report" to fill out, and "yelled at [the plaintiff's] son to 'zip it up, end of discussion.'"[114] When the plaintiff told the flight attendant that she was actually supposed to fill out the form, the flight attendant "went ballistic" and became increasingly "irrational," "yelling at the top of her lungs."[115] Then, over another objection from the plaintiffs, the flight attendant allegedly proclaimed, "[T]hat's it I'm taking this plane down."[116] She proceeded to the phone and told the captain that she had "lost control of the first-class cabin," at which point the captain and first officer, without asking further questions and without looking through the cockpit window, "diverted the plane to Reno, where local police and TSA officials were waiting at the gate."[117]

"The Reno-Tahoe Airport police then came onto the aircraft, and the passengers were disembarked."[118] The captain insisted that the plaintiffs be arrested, but "TSA quickly cleared [the] plaintiffs to continue flying."[119] The captain declined a request to allow them to reboard his flight, and after the plaintiffs boarded an American West flight, Alaska Airlines contacted America West, asking that they deny the plaintiffs passage.[120] As a result of the delay, the plaintiffs missed the scheduled meeting with the potential business partner, never consummated the deal, and were even questioned by the FBI (in response to Alaska Airlines issuing a report to the Joint Terrorism Task Force).[121] They brought suit for damages.[122]

The district court examined the facts alleged and, holding that the standard of review of the airline captain's decision was "arbitrary and capricious" under the Tokyo Convention, granted Alaska Airlines' motion for summary judgment. It is important to note at this juncture that some of these facts alleged by the plaintiff were in dispute, but it was undisputed that, at the time of the incident, the captain only knew that there was a distur-

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114 *Id.* at 863.

115 *Id.*

116 *Id.* at 863–64.

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.* at 865.

122 *Id.*

bance and that the flight attendant had "lost control of the first-class cabin."[123]

The Ninth Circuit overturned the district court, beginning its analysis with the plain language of the treaty,[124] and asserting that because the text is clear, "[the court had] no power to insert amendment."[125] Reasoning that the plain language of the Tokyo Convention conditions immunity for the pilot and crew on the phrase "reasonable grounds," the court found that reasonableness was the appropriate level.[126] The court also considered the "negotiation and drafting history of the treaty,"[127] proclaiming that the drafting history is "consistent with the treaty's plain language," and concluding that "the drafting history say[s] nothing about 'arbitrary and capricious.'"[128] The court particularly relied on statements made by the American delegate to support its conclusion that a reasonableness standard was intended:

> At least in the United States legal system . . . the phrase "reasonable grounds" had a substantial legal significance . . . . Within the general concept of United States law, the phrase "reasonable grounds" would give the impression that the aircraft commander would be required to have a substantial basis for his belief, that he could not act on the basis of facts which were inadequate to support his belief to the effect that a person had committed or was about to commit the kind of act under consideration.[129]

As its next step in interpreting the Tokyo Convention, the court examined the postratification understanding of other nations,[130] in this case, the *Zikry* decision.[131] However, the *Zikry* decision was not examined in detail. The court merely noted that "[i]n *Zikry*, the court held that the key questions were 'whether reasonable grounds [existed to support] the suspicion that the [p]laintiff had committed an offense on board the air-

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[123] *See id.* at 864–65.

[124] *Id.* at 866 (citing Medellin v. Texas, 552 U.S. 491, 518–19 (2008)).

[125] *Id.* (quoting Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989)) (internal quotation marks omitted).

[126] *Id.* at 866–67.

[127] *Id.* at 866 (quoting *Medellin*, 522 U.S. at 507) (internal quotation marks omitted).

[128] *Id.* This statement is patently false, as shown *infra* note 198 and accompanying text.

[129] *Id.* at 867 (quoting Minutes to Tokyo Convention, *supra* note 18, at 155).

[130] *Id.* (citing *Medellin*, 553 U.S. at 507).

[131] *Id.*

craft, as well as the question of reasonableness of the steps taken against him.'"[132]

Finally, the court proclaimed that its "interpretation [was] consistent with [its] cases applying the analogous statute for domestic air law, 49 U.S.C. § 44902(b),"[133] relying on two cases interpreting that statute,[134] both of which held that domestic "airlines don't have immunity when they bar passengers from boarding on the basis of 'unreasonably or irrationally formed' beliefs."[135] As its final justification for adopting a reasonableness standard, the court noted that this "is a well-established and easily-understood standard, one that American courts are accustomed to applying in a wide variety of situations involving the behavior of individuals."[136]

Applying its reasonableness standard to the plaintiffs' facts, the court found that a "fact finder . . . could conclude that [the captain] did not have reasonable grounds to believe that [the] plaintiffs posed a threat to the security or order of the aircraft" because he neither asked questions of the flight attendant nor looked to see the situation through the cockpit window, and therefore, a jury could determine that there was no emergency situation present.[137] Furthermore, a jury could also conclude that the captain did not act reasonably once the plane was on the ground because he could have investigated the flight attendant's adverse report further before asking the police to arrest the plaintiffs.[138]

The *Eid* decision, despite its misleading statements to the contrary, took a markedly different position from the *Zikry* court on how much deference the captain of a plane in international flight should be afforded when trying to ensure the safety of the aircraft.

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[132] *Id.* (quoting DC (Hi) 1716/05 A Zikry v. Air Can. [2006] (Isr.)). Curiously, this is all the court mentioned of *Zikry*; it never attempted to actually show how that court interpreted "reasonable grounds" or "reasonableness." *See id.*

[133] *Id.*

[134] *Id.* at 867–68 (citing Newman v. Am. Airlines, Inc., 176 F.3d 1128 (9th Cir. 1999); Cordero v. Cia Mexicana de Aviacion, 681 F.2d 669 (9th Cir. 1982)).

[135] *Id.* at 868 (quoting *Cordero*, 681 F.2d at 671) (citing *Newman*, 176 F.3d at 1131).

[136] *Id.*

[137] *Id.* at 869–70, 872.

[138] *Id.* at 872.

## IV. A PROPER INTERPRETATION OF THE TOKYO CONVENTION MUST AFFORD THE CAPTAIN AND CREW THE HIGHEST LEVEL OF DEFERENCE

The question of the appropriate level of deference to be afforded to the airline captain is ultimately a treaty interpretation question, which under international law must begin with reference to the Vienna Convention on the Law of Treaties (Vienna Convention).[139] Progressing to the United States, while the Supreme Court has increasingly taken treaty interpretation cases onto its docket as society becomes more globalized, "it is surprising how undertheorized the field of treaty interpretation remains."[140] Indeed, "treaty interpretation contains a myriad of unresolved and controversial issues."[141] A proper understanding of the interpretation of the Tokyo Convention should look not only to the jurisprudence on treaty interpretation alone but also to contract interpretation theory, as the goal of contract interpretation is to give meaning to the intention of the parties.[142]

### A. TREATY INTERPRETATION UNDER INTERNATIONAL LAW AND THE VIENNA CONVENTION

Article 31 of the Vienna Convention states, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[143] While this seems to imply

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[139] *See* Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 115 U.N.T.S. 331 [hereinafter Vienna Convention]; *see also* Carlos Manuel Vasquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 677 n.347 (2008) ("Although the United States is not a party to the Vienna Convention, the treaty is widely understood to have achieved the status of customary international law in the years since it was opened for signature in 1969.").

[140] Curtis J. Mahoney, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 824 (2007).

[141] Malgosia Fitzmaurice, Book Review, 104 AM. J. INT'L L. 329, 329 (2010) (reviewing RICHARD GARDINER, TREATY INTERPRETATION (2008) and ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2008)).

[142] *See* Alabama v. North Carolina, 130 S. Ct. 2295, 2317 (2010) (Kennedy, J., concurring) ("[T]reaties are to be interpreted upon the principles which govern the interpretation of contracts . . . with a view to making effective the purposes of the high contracting parties." (alteration in original) (quoting Sullivan v. Kidd, 254 U.S. 433, 439 (1921))); Mahoney, *supra* note 140, at 826.

[143] Vienna Convention, *supra* note 139, art. 31, ¶ 1.

an almost purely textual interpretation, Article 32 provides that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion," to confirm the text or when the text "leaves the meaning ambiguous or obscure" or "is manifestly absurd or unreasonable."[144]

It is important to note that Article 32's acceptance of supplementary means of interpretation is, on its face, limited to circumstances where the text is in doubt or is ambiguous.[145] This has prompted a great deal of scholarship internationally, primarily regarding the appropriateness of using supplementary means to determine the intention of the parties.[146] While the debate remains open, there is strong support for interpreting treaties with the primary goal of identifying the intention of the parties and using supplementary materials to achieve that purpose: "The intention of the parties—express or implied—is the law. Any considerations—of effectiveness or otherwise—which tend to transform the ascertainable intention of the parties into a factor of secondary importance are inimical to the true purpose of interpretation."[147] This position echoes the United States courts' approach to contract interpretation,[148] which is of critical importance in domestic treaty interpretation.

### B. Treaty Interpretation in the United States

Treaty interpretation in the United States has transformed interestingly in the past twenty years, moving from a dynamic approach (based on principles of contract theory) to a textualist approach (which focuses instead on the commonly understood

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144 *Id.* art. 32.

145 *See id.*

146 *See* Fitzmaurice, *supra* note 141, at 330 ("Apart from differences in the general approach taken to treaty interpretation, certain fundamental issues remain the subject of disagreement—perhaps none more so than the role of the intention of the parties, including as expressed in the *travaux préparatoires*.").

147 *Id.* at 331 (quoting Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 1949 Brit. Y.B. Int'l L. 73); *see id.* at 330 (recognizing that the European Court of Human Rights takes this more "dynamic" approach to treaty interpretation).

148 *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1774 (2010) (recognizing that "as with any other contract, the parties' intentions control" (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985))); United States v. Winstar Corp. 518 U.S. 839, 911 (1996) ("Under ordinary principles of contract law, one would construe the contract in terms of the parties' intent.").

definitions of the words in a treaty rather than the intent of the parties), and back to the contract-based dynamic approach.[149]

Whether applying a textualist or dynamic approach, the United States Supreme Court has clearly held that "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text"[150] as well as "the context in which the written words are used."[151] However, the Court has made clear that the text is merely a starting point: "[T]o ascertain [a treaty's] meaning, we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."[152] Furthermore, a treaty's interpretation should be "consistent with the negotiating history of the [c]onvention, the conduct of the parties to the [c]onvention, and the weight of precedent in foreign and American courts."[153] With respect to specific words, "definition[s] should be flexibly applied after assessment of all the circumstances surrounding."[154]

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[149] *See* Mahoney, *supra* note 140, at 829–32. Mahoney traces the Supreme Court's decisions through three treaty interpretation cases. In *United States v. Stuart*, 489 U.S. 353 (1989), a case involving a bilateral tax treaty between the United States and Canada, the Court drew from a number of supplementary materials, including negotiating materials and past practices of the signatories, while noting that a treaty should be "construe[d] . . . liberally to give effect to the purpose which animates it." *Id.* at 359–70 (alteration in original) (quoting Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 163 (1990)) (internal quotation marks omitted). In *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), the Court, facing an interpretation question under the Warsaw Convention, changed to a textualist approach, as Justice Scalia wrote that the Court "must . . . be governed by the text." *Id.* at 134. However, in *Olympic Airways v. Husain*, 540 U.S. 644 (2004), the Court returned to a contracts-based approach, declaring it is a court's "responsibility to read [a] treaty in a manner 'consistent with the shared expectations of the contracting parties.'" *Id.* at 650 (quoting Air Fr. v. Saks, 470 U.S. 392, 399 (1985)).

[150] Medellin v. Texas, 552 U.S. 491, 506 (2008) (citing *Saks*, 470 U.S. at 396–97).

[151] *Saks*, 470 U.S. at 396–97. It is important to note that the majority in the *Eid* decision curiously left off the part of the quote mentioning "the context in which the . . . words are used." *See* Eid v. Alaska Airlines, Inc., 621 F.3d 858, 866 (9th Cir. 2010). As will be explained *infra*, the context clearly points to a broader interpretation.

[152] *Saks*, 470 U.S. at 396 (quoting Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32 (1943)).

[153] *Id.* at 400; *see Medellin*, 552 U.S. at 507 ("[W]e have also considered as 'aids to interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." (citing Zicherman v. Korean Air Lines, Co., 516 U.S. 217, 226 (1996))).

[154] *Saks*, 470 U.S. at 405.

These "aids to interpretation" that the Court applies clearly indicate that treaties are to be interpreted like contracts. Moreover, the Court has held that "it is [the Court's] responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties."[155] In fact, it seems that an even more dynamic interpretive approach should be taken in treaty interpretation than in that of normal contracts, as the Court has stated that "[t]reaties are construed more liberally than private agreements."[156] Driving the final nail into the textualist's coffin, the Court has recognized that the plain meaning of a treaty's language will be overridden by contradictory intent: "The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'"[157] Lastly, beyond evidence of the general intent of the signatories, the United States' own interpretation (and hence related intent) of a treaty "is entitled to great weight."[158]

The operation of this dynamic approach is clearly illustrated in *Zicherman*, where even Justice Scalia—the champion of modern textualism[159]—recognized that treaty interpretation must go beyond the text of the treaty itself.[160] In *Zicherman*, the plaintiffs sought loss-of-society damages for the death of their relative, whose Korean Air Lines plane had been "shot down over the Sea of Japan" as it traveled from Anchorage, Alaska, to Seoul, South

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[155] *Id.* at 399; *see* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982) ("Our role is limited to giving effect to the intent of the [t]reaty parties.").

[156] *See Saks*, 470 U.S. at 396 (quoting *Choctaw Nation of Indians*, 318 U.S. at 431–32) (internal quotation marks omitted).

[157] *Avagliano*, 457 U.S. at 180 (quoting Maximov v. United States, 373 U.S. 49, 54 (1963)).

[158] Abbott v. Abbott, 130 S. Ct. 1983, 1993 (2010) (quoting *Avagliano*, 457 U.S. at 185 ("deferring to the Executive's interpretation of a treaty as memorialized in a brief before the Court")) (adopting the position taken by the brief for the United States); *see Medellin*, 552 U.S. at 508, 513 (adopting the United States' position as expressed in the amicus brief submitted to the Court on the interpretation of a treaty provision).

[159] Justice Scalia is widely regarded as the champion of modern textualism. *See* William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1511 (1998) ("Scalia's main point is that a statutory text's apparent plain meaning must be the alpha and the omega in a judge's interpretation of a statute."); *see, e.g.*, Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) ("I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context . . . . [W]e apply that ordinary meaning.").

[160] *See* Zicherman v. Korean Air Lines Co., 516 U.S. 217, 224–32 (1996).

Korea.[161] The case required the interpretation of the Warsaw Convention governing international air transportation,[162] in particular Article 17, which provides:

> The carrier is liable for *damage sustained* in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[163]

Thus, the question before the Court was whether the loss of society of a relative is a "damage sustained" that is recoverable under Article 17.[164] Recognizing that the English word "damage," the translation of the word "dommage" from the original French text of the treaty, encompasses "an extremely wide range of phenomena," the Court remarked that "[i]t cannot seriously be maintained that Article 17 uses the term in this broadest sense" and ultimately rejected the application of the term's "plain meaning."[165]

In interpreting the term's meaning, the Court began by stating that it must determine "the shared expectations of the contracting parties"[166] and proclaiming:

> Those involved in the negotiation and adoption of the [c]onvention could not have been ignorant of the fact that the law on this point varies widely from jurisdiction to jurisdiction. . . . [W]e find it unlikely that they would have understood Article 17's use of the general term "*dommage*" to require compensation for elements of harm recognized in France but unrecognized elsewhere, or to forbid compensation for elements of harm *unrecognized* in France but recognized elsewhere.[167]

Thus, to determine the "shared expectations," the Court broke from the text, instead using the "negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties."[168] The Court concluded, based on a pair of statements in the drafting history, that the question

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[161] *Id.* at 219.

[162] *Id.* at 218; *see* Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 [hereinafter Warsaw Convention].

[163] Warsaw Convention, *supra* note 162, art. 17 (emphasis added).

[164] *Zicherman*, 516 U.S. at 221.

[165] *Id.* at 221–22.

[166] *Id.* at 223 (quoting Air Fr. v. Saks, 470 U.S. 392, 399 (1985)) (internal quotation marks omitted).

[167] *Id.*

[168] *Id.* at 226.

of who may recover what damages was to be determined by domestic law.[169] The Court further identified relevant statutes passed by other party states (postratification conduct) that bolstered this conclusion.[170] Having thus used the extra-textual sources of interpretation to identify the intention of the contracting parties to the treaty, the Court concluded that domestic law in the United States did not permit damages for loss of society.[171]

In summarizing treaty interpretation theory both internationally and domestically, we can conclude that under both, treaty interpretation must begin with the text of the treaty itself.[172] However, both recognize that the interpretation of the contracting parties controls and that it may be necessary to go beyond the text to determine that intention. In the United States specifically, the Supreme Court has recognized a list of aids to treaty interpretation: (1) the context in which the words were written;[173] (2) the treaty's history;[174] (3) the drafting and negotiation history of the treaty;[175] (4) the weight of precedent in both foreign and domestic courts;[176] and (5) the executive branch's interpretation, as reflected in amicus briefs submitted before a court.[177]

### C. Both the Text and the Context Vest the Airplane Captain with Wide Discretion, Suggesting a Highly Deferential Standard

Articles 5–10 of the Tokyo Convention vest a broad range of powers in the aircraft commander (or captain) and crew.[178] The captain may impose "reasonable measures including restraint" on any person who threatens "the safety of the aircraft, or of persons or property therein" or the "good order and disci-

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169 *Id.* at 226–27.

170 *Id.* at 227–28.

171 *Id* at 231.

172 *Compare* Vienna Convention, *supra* note 139, art. 31, ¶ 1 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."), *with* Medellin v. Texas, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text.").

173 Air Fr. v. Saks, 470 U.S. 392, 396–97 (1985).

174 *Id.* at 396.

175 *Medellin*, 552 U.S. at 507.

176 *Saks*, 470 U.S. at 400.

177 Abbott v. Abbott, 130 S. Ct. 1983, 1986 (2010).

178 Tokyo Convention, *supra* note 9, arts. 5–10.

pline on board."[179] The captain may also "require or authorize the assistance of other crew members" and may even authorize the passengers to restrain potentially dangerous passengers.[180] Furthermore, crew members or passengers themselves may "take reasonable preventative measures," even without authorization from the captain, when they have "reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein."[181] Once the plane is on the ground, the convention permits the captain to "disembark" any passenger whom he has "reasonable grounds to believe has committed, or is about to commit" any act that threatens "the safety of the aircraft" or passengers, or the "good order and discipline on board," and in that event he is required to "report to the authorities . . . the fact of, and reasons for, such disembarkation."[182] Lastly, the captain may deliver to "competent authorities" in the country where an aircraft lands any person whom he has "reasonable grounds to believe has committed on board the aircraft an act which, *in [the captain's] opinion*, is a serious offence."[183]

In an effort to encourage the exercise of this broad range of powers, the convention immunizes the captain, crew, passengers, and air carrier against any legal liability based on treatment of the passenger in question, provided the actions taken are in accordance with the convention.[184]

Article 1 of the convention explains that the captain's authority covers acts that not only in fact jeopardize safety but also those that might jeopardize the safety or discipline on the aircraft, "*whether or not they are offences.*"[185] The captain does not have to wait until a passenger acts; he may respond with "reasonable measures" once he has "reasonable grounds" to believe that a passenger is about to do something to jeopardize safety.[186] Thus, from the broad scope of authority provided to the captain throughout the entire convention and the immunity it provides to him, it is clear that "the treaty signatories intended the cap-

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179 *Id.* art. 6(1).

180 *Id.* art. 6(2).

181 *Id.*

182 *Id.* arts. 8(1)–(2), 6(1).

183 *Id.* art. 9(1) (emphasis added).

184 *Id.* art. 10; *see* Fitzgerald, *supra* note 20, at 247.

185 Tokyo Convention, *supra* note 9, art. 1(1)(b) (emphasis added).

186 *Id.* art. 6(1).

tain's exercise of that authority to be reviewed with great deference, whatever the precise articulation of that standard."[187]

This assertion is further affirmed when one considers that the convention provides that once a pilot has turned over a passenger to the competent authorities, these authorities—trained in investigative techniques—are responsible for any investigation needed.[188] As such, a passenger whom hindsight reveals not to have committed a crime will not be subject to penalty. Thus, the convention, when viewed in its entirety, delicately balances the interest in maintaining security on board aircraft with the private interests of the individuals.

Surveying the entire context in which the terms "reasonable grounds to believe" and "reasonable measures" are used confirms this broad authority conferred upon the captain.[189] Ignoring this was a critical mistake made by the Ninth Circuit in *Eid.* The court took a flawed and myopic textualist approach to the treaty, focusing almost exclusively on the terms "reasonable grounds" and "reasonable measures."[190] It relied exclusively on the use of the word "reasonable" as indicative that the "text is clear" that reasonableness is the standard of review because, it asserted, reasonableness is "easily-understood."[191] Concluding that "reasonable" is well-established and easily-understood, particularly in light of an international agreement, falls nothing short of judicial hubris of the highest caliber. In fact, "[f]rom a methodological point of view, it appears that an analysis of the notion of 'reasonable' cannot be achieved through a mere technical or dogmatic approach," but "[r]ather, this analysis requires that the notion be examined from a variety of critical angles."[192] The majority of international scholarship "emphasise[s] the notion's essentially subjective character, which renders, if not impossible, at least extremely difficult any at-

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[187] Brief for the United States of America as Amicus Curiae at 13, Eid v. Alaska Airlines, Inc., 621 F.3d 858 (9th Cir. 2010) (No. 06-16457).

[188] *Id.* at 19.

[189] *See Eid,* 621 F.3d at 866–68.

[190] *See id.* at 866–67.

[191] *Id.* at 866, 868.

[192] Oliver Corten, *The Notion of "Reasonable" in International Law: Legal Discourse, Reason and Contradictions,* 48 INT'L & COMP. L.Q. 613, 613 (1999). In this article, the author analyzed the term "reasonable" as used in an international context from several hundred decisions and opinions by various international courts. *See id.* at 613–25.

tempt to provide a definition."[193] This variety-of-angles analytical approach to words of difficult international definition seems to be exactly what the Court did in *Zicherman*, analyzing the term "damages" from a variety of different viewpoints, and it is indeed what we must do in discerning the proper level of deference under the Tokyo Convention.[194]

Lastly, even if there were a clear definition of the term "reasonable" or "reasonableness" in the international context, such a definition would not control if "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."[195] A restrictive understanding of "reasonable" is indeed inconsistent with the expectations of the signatories, as the history of the Tokyo Convention, its drafting, other courts' decisions, and the executive branch's interpretation of it all clearly show.

### D. The History of the Tokyo Convention Demonstrates That the Intent of the Parties Was to Confer Broad Discretion

As was discussed in Part II, the Tokyo Convention was drafted at a time when a growing number of incidents threatened airline security, causing the "principal purpose" of the convention to shift from jurisdictional issues arising from international air travel to "the enhancement of safety" on board the aircraft.[196] The extensive history behind the development of the convention, in particular Articles 5–10 on the "Powers of the Aircraft Commander," demonstrates that the central goal of the broad immunity conferred by the Tokyo Convention was "to encourage captains to take decisive action, often under chaotic circumstances, to preserve the safety of the plane and its passengers without fear of [second-guessing]."[197] A highly deferential standard of review is necessary to give effect to this goal.

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[193] *Id.* at 614; *see also Eid*, 621 F.3d at 882 (Otero, J., dissenting) ("[T]he word 'reasonable' does not necessarily carry the same meaning across all legal systems.").

[194] *See supra* notes 164–71 and accompanying text.

[195] Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 180 (1982) (quoting Maximov v. United States, 373 U.S. 49, 54 (1963)) (internal quotation marks omitted).

[196] *See supra* notes 19–77 and accompanying text.

[197] Brief for the United States of America as Amicus Curiae, *supra* note 187, at 14.

### E. The Drafting and Negotiating History Demonstrates Clear Intent for a Highly Deferential Standard of Review

The drafting and negotiating history, contrary to the misleading assertions made by the court in *Eid*, shows that a highly deferential standard was meant to apply. Even the statements of the U.S. delegate to the convention quoted by the Ninth Circuit in support of a reasonableness standard actually contemplated an arbitrary and capricious standard, specifically at the end of the passage, with the remark that "[i]n other words, the aircraft commander could not act arbitrarily or capriciously."[198]

Furthermore, a brief exploration of the understanding of the term "reasonable grounds" in the United States at the time the convention was adopted in 1969 reveals it to imply a highly deferential standard. As the U.S. representative stated, "'the phrase "reasonable grounds" had a substantial legal significance' in U.S. law."[199] At that time, the phrase "reasonable grounds to believe" was used in certain federal statutes, including one authorizing Bureau of Narcotics agents "to make warrantless arrests where there were 'reasonable grounds to believe' a violation of federal narcotics laws had occurred or was occurring."[200] Additionally, "the Supreme Court [had] held that information from a reliable informant could provide 'reasonable grounds' under the statute."[201] The Supreme Court had also held that "reasonable grounds" under federal arrest statutes inquire only as to whether "the facts and circumstances *known to the officer* warrant a prudent man in believing that the offense has been committed."[202] Applying these standards by analogy to an airline captain, "reasonable grounds" exist when a captain relies on the facts known to him, as provided by members of his crew (reliable informants). This is a far more deferential stan-

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[198] Minutes to Tokyo Convention, *supra* note 18, at 155; *see Eid*, 621 F.3d at 867. Of critical importance is that the court in *Eid* omitted the last sentence advocating the arbitrary and capricious standard, which not only shows that the court's interpretation is entirely inconsistent with the intention of the drafting parties, but it is also intentionally misleading and incorrect. *See Eid*, 621 F.3d at 867.

[199] Brief for the United States of America as Amicus Curiae, *supra* note 187, at 16.

[200] *See id.* at 17 (citing Narcotics Control Act of 1956, Pub. L. No. 84-728, § 104, 70 Stat. 567, 570).

[201] *Id.* (citing Draper v. United States, 358 U.S. 307, 313 (1959)).

[202] *Id.* (emphasis added) (quoting Henry v. United States, 361 U.S. 98, 102 (1959)).

dard of review than the reasonable-person inquiry applied in *Eid.*

Moving beyond the assertions and understanding of the United States, the minutes to the Tokyo Convention are replete with statements indicating a highly deferential standard of review. The Greek representative noted that the purpose of the language of Article 5 was to ensure that "the aircraft commander would not exercise his powers *in an arbitrary way.*"[203] The British representative explained his understanding to be "that the aircraft commander was not protected if he exceeded his powers, if he acted *maliciously.*"[204] The Italian representative was in favor of immunity if the pilot did not "[commit] *arbitrary* acts."[205] The German representative understood that a pilot had acted "without reasonable grounds, if he *intentionally abused* his powers or if he was guilty of *serious* negligence."[206] And the parties to the convention rejected an Argentine proposal that would have required the aircraft commander to have an objective basis of "concrete" and "specific external facts" when restraining or disembarking a passenger who had not yet committed an act, as it would conflict with the convention's goal "to give powers of judgment to the aircraft commander."[207]

Furthermore, the minutes indicate the drafters' concern that the prospect of liability would paralyze the flight crews from "exercis[ing] the full authority given to them by the [c]onvention," as demonstrated by their consistent rejection of proposals to "water down" or remove the immunity provided by the convention.[208] For example, the drafters rejected an immunity provision that required the captain to adhere "strictly" to the treaty terms, since a restrictive interpretation would reduce the protection the convention sought.[209] Likewise, a proposal to eliminate the immunity provision altogether was quickly rejected, as "the aircraft commander might have to hesitate and might, perhaps, do nothing in circumstances in which he should have acted."[210]

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[203] Minutes to Tokyo Convention, *supra* note 18, at 174 (emphasis added).

[204] *Id.* at 221–22 (emphasis added).

[205] *Id.* at 226 (emphasis added).

[206] *Id.* at 227 (emphasis added).

[207] *Id.* at 178–79.

[208] *See* Brief for the United States of America as Amicus Curiae, *supra* note 187, at 9, 14.

[209] Minutes to Tokyo Convention, *supra* note 18, at 223–24.

[210] *Id.* at 219, 223.

Thus, the minutes to the convention clearly demonstrate that the drafting parties not only intended a highly deferential standard for reviewing acts taken by captains and crews pursuant to the convention, but also feared the consequences of not affording such deference with respect to the immunity provision.

### F. The Majority of Foreign Courts and Domestic Courts, by Analogous Federal Statute, Confirm a Highly Deferential Standard

As discussed in Part III of this article, the only other court to have specifically addressed the standard of review for an airline captain's acts under the Tokyo Convention is the Israeli court in *Zikry*.[211] While not explicitly defining "reasonable grounds," the *Zikry* court showed a great deal of deference to the actions taken by the captain and his crew, explicitly stating that in determining whether the captain's actions were "reasonable," the captain did not have to prove that an actual crime was committed but merely that he had "reasonable grounds" to believe that one might have been.[212] Furthermore, the facts of the case were to be examined only as the captain knew them at the time of the event—not with the benefit of hindsight.[213] The court therefore not only found that the captain's decision to disembark the alleged offender was reasonable, but so was the airline's decision to ban him from all further flights.[214]

Bringing the subject closer to home, American courts interpreting the analogous domestic statute, 49 U.S.C. § 44902,[215] have given great deference to airline captains, applying an arbitrary and capricious standard of review. Section 44902(b) states: "[A]n air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the air carrier decides is, or might be, inimical to safety."[216] The Second Circuit set out the test for reasonableness under Section 44902 in *Williams v. Trans World Airlines*:

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[211] *See supra* notes 78–104 and accompanying text.

[212] *See supra* notes 98–101 and accompanying text.

[213] *See supra* note 100 and accompanying text.

[214] *See supra* note 104 and accompanying text.

[215] Both the majority and dissent in *Eid* recognized this to be analogous to the Tokyo Convention and correctly stated that this statute is relevant to the proper interpretation of the Tokyo Convention. *See* Eid v. Alaska Airlines, Inc., 621 F.3d 858, 883 (9th Cir. 2010).

[216] 49 U.S.C. § 44902(b) (2006).

> The test of whether or not the airline properly exercised its power under [Section 44902] . . . rests upon the facts and circumstances of the case *as known to the airline at the time it formed its opinion* and made its decision and whether or not the opinion and decision were rational and reasonable *and not capricious and arbitrary* in the light of those facts and circumstances. They are *not to be tested by other facts later disclosed by hindsight.*[217]

The other circuits have since either adopted the same test or applied the same arbitrary and capricious standard. In *Cerqueira v. American Airlines*, the First Circuit "agree[d] with *Williams* and h[e]ld that an air carrier's decisions to refuse transport under [Section] 44902(b) are not subject to liability unless the decision is arbitrary or capricious."[218] The Ninth Circuit expressly agreed with the *Williams* test in *Cordero v. CIA Mexicana de Aviacion*, adopting the arbitrary and capricious standard,[219] and has recently reaffirmed this position in *Shaffy v. United Airlines, Inc.*[220] And in *Smith v. Comair, Inc.*, the Fourth Circuit took a similar approach, holding that "[p]ursuant to 49 U.S.C. § 44902(b), airlines must be accorded *broad discretion* in making boarding decisions related to safety."[221]

Under both foreign case law and analogous domestic case law, it is clear that the airline captain must be afforded great deference when reviewing his actions under the Tokyo Convention.

### G. The Executive Branch's Interpretation Advocates a High Degree of Deference

The Ninth Circuit in *Eid* asked the Department of Justice to submit a brief as amicus curiae explaining the U.S. position on the appropriate level of deference to be applied under the Tokyo Convention.[222] However, the majority made no mention of this brief in its analysis of the Tokyo Convention, despite abundant Supreme Court precedent holding that the interpretation of the United States is entitled to great weight.[223] In its thirty-page brief, the United States repeatedly advocated for a highly deferential standard, citing the text of the convention, the his-

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[217] 509 F.2d 942, 948 (2d Cir. 1975) (emphasis added).

[218] 520 F.3d 1, 14 (1st Cir. 2008).

[219] 681 F.2d 669, 671–72, 672 n.4 (9th Cir. 1982).

[220] 360 F. App'x 729, 730 (9th Cir. 2009).

[221] 134 F.3d 254, 259 (4th Cir. 1998) (emphasis added).

[222] *See* Brief for the United States of America as Amicus Curiae, *supra* note 187, at 1.

[223] *See supra* note 158 and accompanying text.

tory surrounding its adoption, and the drafting history of the text.[224] The position taken by the United States was that "[t]he Tokyo Convention vests pilots and other flight crew with *expansive discretion* to take action in response to potential threats to safety, order, and discipline affecting the plane or its passengers," that "[a] court applying the Tokyo Convention should not simply ask whether the captain's actions were correct with the benefit of hindsight, but must consider whether the information *known to the captain at the time* supports the exercise of broad discretion afforded to him," and "that the treaty signatories intended the captain's exercise of [his] authority to be *reviewed with great deference.*"[225]

### H. As a Practical Matter, the Culture of Flight Today and Current United States Law Necessitate a Highly Deferential Standard

In their amici curiae brief to the Supreme Court, the International Air Transport Association (IATA), who participated in the drafting of the Tokyo Convention, and the Air Transport Association of America (ATA), who urged its ratification in the United States, advocated a highly deferential standard of review under the convention.[226] Alluding to the increasing number and gravity of incidents involving disruptive passengers, the enhanced security concerns in the wake of 9/11, and the special environment and risks associated with airline flight, they advocated a highly deferential standard because it "is essential to safe and orderly civil aviation."[227] Both the IATA and the ATA recognized that captains have a unique responsibility, that the culture of flight is different in the wake of 9/11, both from a standpoint of heightened social awareness of danger as well as increased airline regulations, and that the airplane in flight is a unique environment with unique risks.

To begin, it is long-standing law and a well-understood notion today that the captain of an aircraft, "or pilot in command, is directly responsible for, and is the final authority as to the oper-

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[224] *See* Brief for the United States of America as Amicus Curiae, *supra* note 187.

[225] *Id.* at 8, 13, 20 (emphasis added).

[226] *See* Brief of Amici Curiae Air Transport Ass'n of America, Inc. & International Air Transport Ass'n in Support of Petitioner, Alaska Airlines, Inc. v. Eid, 131 S. Ct. 2874 (2011) (No. 10-962), 2011 WL 720850, at *4 [hereinafter ATA/IATA Brief].

[227] *Id.* (quoting ICAO Assembly Resolution A33-4 (33d Sess., Montreal, Sept. 25–Oct. 5, 2001)).

ation of the aircraft and the safety of the passengers and crew."[228] Since 9/11, the weight of this responsibility has grown heavier, with the threat of terrorism even greater than at the time of the Tokyo Convention.[229] Furthermore, the new security regulations since 9/11 have bestowed upon the captain greater responsibility for security concerns.[230]

These new security measures, as well as added regulations and training for both captains and crews, make it impracticable, if not impossible, to act if they are to be held to anything but a greatly deferential standard. For example, since 9/11, FAA regulations require that all passenger aircraft have reinforced lockable cockpit doors, which must remain closed at all times when the aircraft are in operation.[231] Additionally, the pilots must remain in their seats with seat belts fastened.[232] Because of these regulations, a captain must "rely [on] the reports of his cabin crew."[233] Furthermore, not only is his reliance on the cabin crew practically necessary, but it is "fundamentally sound," since the entire cabin crew is trained and certified pursuant to FAA regulations, receiving the flight security training required by the TSA.[234] That such reliance is fundamentally sound is bolstered by additional training and instruction that pilots and crews now receive in the post 9/11 world. Pilots are forbidden from leaving the flight deck to help crew members with security problems, and crew members are instructed to "[e]nsure that the flight deck door is secure at the first sign of a threat," never to be opened "under any circumstances, including bodily harm

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[228] Appellee's Brief at 10, Eid v. Alaska Airlines, Inc., 621 F.3d 858 (9th Cir. 2010) (No. 06-16457), 2007 WL 968289 (quoting 14 C.F.R. § 91.3(a) (2006) ("[T]he pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft."); 14 C.F.R. § 121.537 (2006) ("Each pilot in command of an aircraft is, during flight time, in command of the aircraft and crew and is responsible for the safety of the passengers, crewmembers, cargo, and aircraft . . . .")).

[229] ATA/IATA Brief, *supra* note 226, at *7 ("[T]he threat is always evolving and terrorist tactics are becoming more sophisticated.").

[230] Brief of Amici Curiae Air Line Pilots Ass'n, International & International Federation of Air Line Pilots Ass'n in Support of Petitioner, Alaska Airlines, Inc. v. Eid, 131 S. Ct. 2874 (2011) (No. 10-962), 2011 WL 688738, at *4 [hereinafter Pilots' Brief].

[231] 14 C.F.R. §§ 25.795, 121.587 (2011).

[232] 14 C.F.R. § 121.543 (2011).

[233] Pilots' Brief, *supra* note 230, at 6.

[234] *Id.* (citing 14 C.F.R. §§ 121.415, 121.417 (2010); 49 C.F.R. § 1544.233 (2010)).

to passengers or other [crew members]."[235] They are also warned that any lower-level threats can, and often do, escalate into higher-level threats and that lower-level threats could be used as distractions by hijackers to infiltrate the flight deck.[236] Lastly, they are advised that "[e]arly communication *and intervention* can help prevent threat escalation."[237]

To impose upon pilots a more restrictive standard of review, such as the reasonableness standard taken by the Ninth Circuit in *Eid*, ignores the reality of contemporary flight security measures. Such a standard would require a captain to conduct an independent investigation before acting,[238] something that captains have neither the time nor the resources to do when traveling at incredible speeds and altitudes in a completely closed environment.[239] In contrast, a deferential standard takes into account the time-sensitive nature of flight, the increasing regulations and training imposed upon captains and their crews, and the heavy responsibility carried by captains.

## V. CONCLUSION

The Tokyo Convention was a thirteen-year process created at a time when aircraft security was of the utmost importance, and yet the threat that existed back then seems far less than what we face today in a post-9/11 world. Not only is a highly deferential standard of review necessary in light of this bleak reality, it is also consistent with the text and context of the convention, the clear intention of the drafting parties, the international and domestic case law, and the United States' own interpretation of the treaty it ratified. A pilot seeking to secure safety on board an international flight must be confident that his judgment will be afforded the greatest level of deference should he find it necessary to tell a passenger: "Get off my plane." This, even more than the grizzliest Harrison Ford impersonation, will lend the necessary weight to his words.

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235 FAA, THE COMMON STRATEGY FOR HIJACK 21 (2002), *reprinted in* Brief for the United States of America as Amicus Curiae, *supra* note 187, app.

236 *Id.*

237 *Id.* (emphasis added).

238 Pilots' Brief, *supra* note 230, at 7–8.

239 *Id.*